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Nos. 02-1574 and 02-1624

Supreme Court, U.S.
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In The Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

MICHAEL A. NEWDOW, *et al.*,

Respondents.

and

ELK GROVE UNIFIED SCHOOL DISTRICT, *et al.*,

Petitioners,

v.

MICHAEL A. NEWDOW,

Respondent.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR GRAY DAVIS, GOVERNOR OF THE STATE OF CALIFORNIA, AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS UNITED STATES OF AMERICA AND ELK GROVE UNIFIED SCHOOL DISTRICT

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QUESTIONS PRESENTED

Governor Davis adopts the questions presented from the petitions for writ of certiorari filed by the United States of America and the Elk Grove Unified School District in this matter.

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INTEREST OF AMICUS CURIAE[1]

A primary purpose of education in California is to train school children in good citizenship, patriotism and loyalty to the state and the nation as a means of protecting the public welfare. Cal. Educ. Code § 233.5; *In re Shinn*, 195 Cal.App.2d 683, 686 (1961). California courts have recognized that the Pledge of Allegiance, with its reference to God, is part of our national culture. See *Sands v. Morongo Unified Sch. Dist.*, 53 Cal.3d 863, 917 n.1 (1991). Indeed, relying on this Court's precedent, California's courts long ago declined to excuse a student from compliance with a general and neutral requirement to say the Pledge, based on a religious objection. *Gabrielli v. Knickerbocker*, 12 Cal.2d 85 (1938), *app. dismissed, cert. denied*, 306 U.S. 621 (1939).

Governor Davis is the chief executive officer of the State of California, charged with the obligation to see that the law is faithfully executed. Cal. Const., art. V, § 1. California law requires that a daily patriotic exercise be conducted in elementary and secondary school classrooms, noting explicitly that recitation of the Pledge of Allegiance will satisfy that requirement. Cal. Educ. Code § 52720. Indeed, petitioner Elk Grove Unified School District implemented this statute by enacting a policy allowing students to participate voluntarily in daily teacher-led recitations of the Pledge. The Ninth Circuit's decision

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Amicus Curiae or his counsel made a monetary contribution to the preparation and submission of this brief.

effectively invalidates a portion of § 52720, precluding Elk Grove School District and every other school district in California from complying with the statute's requirements by reciting the Pledge of Allegiance.

Governor Davis respectfully submits this brief in furtherance of his state constitutional duty to ensure implementation of California's policy of encouraging voluntary, group recitation of the Pledge of Allegiance in public school classrooms.

SUMMARY OF ARGUMENT

There can be little doubt that the question whether school districts may lawfully offer group recitation of the Pledge of Allegiance to the Flag, for voluntary recitation by school children, presents an issue of national cultural and social importance. Review of the Ninth Circuit's decision in this case is warranted for that reason alone, so that California schools may freely offer the Pledge of Allegiance as a daily expression of patriotism and national unity.

Review is also warranted because the Ninth Circuit's characterization of the school district's daily patriotic recitation of the Pledge of Allegiance as a "coerced religious act" ignores this Court's prior recognition that, despite its religious reference, the Pledge of Allegiance is today an essentially secular exercise, deeply rooted in American culture and history. The fact that some students may personally find the phrase "under God" to be offensive to their religious beliefs should not be a basis for empowering the offended students to deprive other students of the opportunity to join with their classmates in what should

properly be considered a secular group expression of American loyalty and unity.

Finally, the petitions for certiorari should be granted because the holding of the Ninth Circuit conflicts with the decision of the Seventh Circuit, and the issues presented by the petitions require a uniform, national rule.

ARGUMENT

I. Review is necessary to clarify that, for the public welfare, California is free to offer daily recitation of the Pledge of Allegiance in classrooms as a patriotic exercise for students, so long as participation by individual students is voluntary.

California Education Code § 52720 requires daily appropriate patriotic exercises in public elementary schools, and further provides that the recitation of the Pledge satisfies this requirement. The Ninth Circuit's amended opinion casts unwarranted doubt on the constitutionality of the California statute. Although the Court of Appeals declined to decide plaintiff's request for declaratory relief as to both the constitutionality of the Pledge and the California statute, U.S. App. 6a and 18a, its decision necessarily implicates the constitutionality of both. Review is warranted to dispel any notion that the patriotic exercise authorized by California law amounts to a coerced religious act.

In acknowledging the unbroken history of official references to the role of religion in American public life from at least 1789, this Court noted that the Pledge "is recited by thousands of public school children – and adults

– every year." *Lynch v. Donnelly*, 465 U.S. 668, 676 (1984). It is California's policy to honor that heritage and tradition. To now preclude recitation of the Pledge in classrooms, because a two-word phrase therein has religious significance for a student's parent, ignores the Pledge's predominant value in teaching children traditional lessons of patriotism and unity.

If the "Pledge of Allegiance to the Flag" that includes the phrase "under God" may no longer be offered to students in the classroom, then no official pledge of allegiance exists that may presently be offered to students as a patriotic expression of loyalty in unity with other Americans. To be sure, California school districts might substitute a hybrid "pledge" as a patriotic exercise, omitting the phrase "under God." But then, of course, it would not be the *Nation's* Pledge of Allegiance to the Flag that would be recited, but rather a California *version* of that Pledge. The only "Pledge of Allegiance to the Flag" that officially and nationally expresses Americans' loyalty is the Pledge as defined by Congress. 4 U.S.C. § 4.

Review of the Ninth Circuit opinion is, therefore, necessary to confirm that California public schools act consistently with the Constitution when they start the school day, as they have for many years, by reciting the Pledge.

II. Review should be granted because the Ninth Circuit's opinion directly conflicts with multiple statements by this Court recognizing the fundamentally cultural character, and therefore the constitutionally permissible nature, of the Pledge.

1. In holding that Elk Grove's policy of offering voluntary student participation in teacher-led recitation of the Pledge violates the Establishment Clause, the Ninth Circuit ignores this Court's repeated recognition of the Pledge as an essentially secular, culturally and historically informed, ceremonial formulary. Review is necessary to correct the Ninth Circuit's error.

This Court has consistently "declined to take a rigid, absolutist view of the Establishment Clause." *Lynch v. Donnelly*, 465 U.S. at 678. Far from ever holding that any government-sanctioned reference to our country's religious heritage is forbidden by the Constitution, the Court has instead stated that a "relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Lee v. Weisman*, 505 U.S. 577, 598 (1992). As stated by this Court, "there is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Lynch*, 465 U.S. at 674. The Court pointed to countless examples of that acknowledgment, including the national motto "In God We Trust" on our currency. *Id.* at 676.

In *Lynch*, this Court approvingly referred to our country's acknowledgments of its religious heritage, including the Pledge, when it held that a city did not violate the First Amendment by including a nativity scene

in an annual Christmas display. *Id.* at 676-77. Subsequently, in ruling on the constitutionality of the display of a creche and a menorah, this Court noted that its prior decisions had characterized the Pledge "as *consistent* with the proposition that government may not communicate an endorsement of religious belief." *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 602-03 (1989) (emphasis added).

Justices of this Court have also consistently recognized the cultural and historical basis for the Pledge. Among many examples, Justice Brennan noted that the reference to God in the Pledge "may merely recognize the historical fact that our Nation was believed to have been founded 'under God'." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 304 (1963). Justice O'Connor explained that the Pledge, including the words "under God", serves as an appropriate acknowledgment of religion for the purpose of solemnizing public occasions. *Wallace v. Jaffree*, 472 U.S. 38, 78 n.5 (1985).

Nevertheless, relying on this Court's opinions in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) and *Lee v. Weisman*, 505 U.S. 577 (1992), the Ninth Circuit ruled that offering the Pledge to students was tantamount to coercion of a religious act.

2. But offering an historic, essentially secular, patriotic expression of loyalty that is deeply rooted in tradition should not be equated with a "coerced religious act" merely because some may have a religious objection to the reference to God in the pledge formula. Such a result is suggested by this Court's treatment of Free Exercise objections to neutral regulations of general applicability.

In 1939, this Court declined to review a decision of the California Supreme Court refusing to recognize a religious objection to the recitation of the Pledge of Allegiance by an elementary school student. Significantly, the Court expressly declined review "for want of jurisdiction." *Gabrielli v. Knickerbocker*, 12 Cal.2d 85 (1938), *app. dismissed and cert. denied*, 306 U.S. 621 (1939). Previously, the Court had similarly declined to review other state court judgments upholding the validity of regulations requiring recitation of the Pledge of Allegiance on religious grounds – for want of a substantial federal question. See *Leoles v. Landers*, 192 S.E. 218 (Ga. 1937), *app. dismissed by* 302 U.S. 656 (1937); *Hering v. State Bd. of Education of New Jersey*, 194 A. 177 (N.J.Err. & App.1937), *app. dismissed by* 303 U.S. 624 (1937).

These disputes, of course, antedated Congress' addition of the phrase "under God" to the Pledge of Allegiance, but the recitation of the earlier version of the Pledge offended the religious sensibilities of some students. This Court's dismissal of those Free Exercise claims perhaps foreshadowed the Court's Free Exercise analysis as articulated in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). There, the Court ruled that the First Amendment does not afford a religious exemption from compliance with otherwise neutral laws of general applicability

Amicus submits that a related, if "obverse," analysis may be appropriate here: The Establishment Clause should not be construed to empower Michael Newdow to prevent other students from voluntarily reciting the Pledge of Allegiance in a state-sponsored patriotic exercise merely because he ascribes religious significance to the phrase "under God" and, therefore, views the recitation as

a "coerced religious act." Whatever may have been Congress' original intent in adding the phrase,[2] the two words "under God" are now substantially embodied in the secular culture of the body politic and are submerged in what is undeniably a secular and formulaic expression of patriotism and unity as Americans.

The Ninth Circuit ignored this Court's prior statements about the Pledge, and branded as "religiously coercive" Elk Grove's policy of teacher-led recitation of the Pledge, merely because it includes the phrase "under God." Review is warranted to settle that, despite reference to God, the Pledge's essentially secular character is dispositive of any "coerced religious act" basis for striking down the Pledge on Establishment Clause grounds.

III. Review is necessary to resolve a split between circuits over an issue about which there is an overriding need for national uniformity.

Review is also necessary because the Ninth Circuit's opinion squarely conflicts with the Seventh Circuit's holding in *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992). In *Sherman*, parents of an elementary school student sued a school district to enjoin compliance with a state statute requiring daily recitation of the Pledge by elementary school pupils. Unlike the Ninth Circuit, the

[2] The Ninth Circuit expressly declined to decide whether the Pledge violates the Establishment Clause as an endorsement of religion or under this Court's analysis in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

Seventh Circuit unanimously held that the 1954 amendment to the Pledge is consistent with the Establishment Clause. The Seventh Circuit satisfied itself that the Framers manifestly did not understand ceremonial invocations of God to constitute "establishment" of religion with the meaning of the First Amendment. *Id.* at 445-48.

The Seventh Circuit took note of this Court's observation that the Pledge's reference to God is wholly "*consistent* with the proposition that government may not communicate an endorsement of religious belief." *Id.* at 447 (quoting *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 602-03 (1989)). The Ninth Circuit's decision irreconcilably conflicts with *Sherman*. In contrast to the Ninth Circuit, the Seventh Circuit in *Sherman* prudently elected to maintain the status quo unless and until this Court rules otherwise. Unlike the Ninth Circuit, the Seventh Circuit understood that school-prayer cases are inapplicable where, like here, the reference to God is not part of a state-sanctioned formal religious observance.

There is an overriding need for national uniformity in resolution of Establishment Clause challenges to the Pledge as it has been recited for nearly fifty years by citizens throughout this country and in American installations abroad. It is unimaginable that recitation of the Pledge – a verbal symbol of national unity – might be permissible in one form in one state, but impermissible in that same form in another state. The conflict between the Ninth and the Seventh Circuits demands review and resolution.

CONCLUSION

For the reasons stated, the Court should grant the petitions for certiorari.

Dated: June 18, 2003

Respectfully submitted,

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